78-399

IN THE

Supreme Court Of The United States

Charles Bruce Nabors.....*Petitioner*

V.

State of Arkansas.....*Respondent*

PETITION FOR WRIT OF CERTIORARI

Ark Sup Ct

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas, reported in 263 Ark. 406, copy of which opinion is contained in the appendix hereto as Exhibit One.

BASIS OF JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered May 8, 1978, affirming the decision of the Circuit Court of Pulaski County, Arkansas, entered

July 1, 1977. The Circuit Court of Pulaski County in a jury trial found the petitioner guilty of theft of property in value. (Exhibit 2) A petition for rehearing was timely filed. The petition for rehearing was denied June 12, 1978 (Appendix-Exhibit 3) and the decision of the Supreme Court of Arkansas became final on June 12, 1978. A stay of mandate pending disposition by this Court was granted by the Arkansas Supreme Court June 12, 1978. The jurisdiction of this Court is based upon the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S. Code Sec. 1257(3), providing that this Court may by writ of certiorari, review any final judgment or decree rendered by the highest court of a State in which a decision could be had, where any title, right, privilege, or immunity is specially set up or claimed under the constitution, treaties, or statutes of, a commission held or authority exercised under, the United States.

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether the Confrontation and Compulsory Witness Clause of the Sixth Amendment as applied to the states by the Fourteenth Amendment requires the issuance of a subpoena duces tecum upon request of the defendant to discover the contents of the personnel records of a police officer-witness without showing good cause therefore and also for discovery purposes only. The defendant contends that this was required under the constitutional provisions in order for the petitioner to

adequately prepare for the cross-examination and impeachment of the officer-witness.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, ..."

U.S. Constitution, Amendment XIV, Section 1:

> " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . ."

FACTS OF THE CASE

On September 23, 1976, an information was filed in the Pulaski County, Arkansas Circuit Court charging petitioner with theft of property. On June 7, 1977 the petitioner filed a written motion (Appendix—Exhibit 4) seeking issuance of a subpoena duces tecum for the personnel records of Little Rock Detective Keith Rounsavall. This motion was filed for discovery purposes. This motion was overruled by the court prior to trial on June 9, 1977. (Appendix-Exhibit 5) An exception to the ruling is not required under Arkansas law. Detective Rounsavall was a key witness for the State. The defendant was shot and wounded by

Detective Rounsavall while being apprehended. Detective Rounsavall's version of this shooting incident differed at trial from that of the petitioner's testimony. Petitioner contended in his written motion that the reason for the motion was to obtain possible information on past shooting incidents involving Detective Rounsavall that could possibly impair the credibility of the officer-witness. Petitioner raised the Confrontation and Compulsory Witness Clause of the Sixth Amendment as points for reversal in his brief to the Supreme Court of Arkansas. (Appendix-Exhibit 6)

ARGUMENT OF ISSUANCE OF WRIT

The Court has not ruled previously on the right of a defendant in a criminal case to discover material in the hands of a third person without a showing of good cause and for discovery purposes only. However, the constitutional basis of this right appears in many of the Court's previous decisions.

The Fourteenth Amendment guarantees more than that the defendant should have a lawyer. It assures "effective aid in the preparation and trial of the case," *Powell v. Alabama*, 287 U.S. 45, 71 (1932), and it may be violated whenever defense counsel is required to operate under circumstances that render his services ineffective. *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Brooks v. Tennessee*, 406 U.S. 605 (1972), Appointment of counsel in adequate time prior to trial was required in *Powell v. Alabama*, supra because during the pretrial period "consultation, thorough-

going investigation and preparation were vitally important." 287 U.S. at 57. If adequate *time* to prepare is a constitutional mandate, it must be evident that adequate *information* is also required.

In 1976, the Court held that the Confrontation Clause of the Sixth Amendment is incorporated into the Fourteenth Amendment and hence applies to State criminal trials. *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965). The *Pointer* and *Douglas* cases recognize that adequate cross-examination is the essence of the right. Even apart from the Sixth Amendment, fair opportunity for cross-examination is an indispensable element of due process in any hearing that may have significant adverse consequences for an individual. *Specht v. Patterson*, 386 U.S. 605, 610 (1967). Substantial impairment of cross-examination violates these rights. *Smith v. Illinois*, 390 U.S. 129, 131 (1968).

The Sixth Amendment also guarantees a criminal defendant the right "to have compulsory process for obtaining witnesses in his favor." The Clause was incorporated into the Fourteenth Amendment in *Washington v. Texas*, 388 U.S. 14 (1976). The Court has lately recognized that "few rights are more fundamental than that of an accused to present witnesses in his own defense" *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). An accompanying right to defensive evidence in the hands of third parties that *might* lead to defensive evidence can be inferred.

CONCLUSION

Petitioner in conclusion respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas, reported in 263 Ark. 406.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX – EXHIBIT ONE

Charles Bruce NABORS v. STATE of Arkansas
263 Ark. 406

Opinion delivered May 8, 1978
(Division 1)

Russell Reinmiller, for appellant.

Bill Clinton, Atty. Gen., by: *Joyce Williams Warren*, Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, JUSTICE. The jury sentenced the appellant to 17 months' imprisonment upon a charge of theft of property. Three points for reversal are argued.

First, the appellant, in the course of being apprehended by police officers a few hours after the burglary out of which the charge arose, suffered two shotgun wounds. One of the shots was apparently fired by Officer Keith Rounsavall. Before the trial the defense sought a subpoena duces tecum for the production by the police department of Officer Rounsavall's personnel records. The defendant's theory was that the personnel records might supply a basis for cross-examination with respect to the officer's credibility, the suggestion being that the officer's "past shooting record" might be useful to the cross-examiner. The abstract contains no allegation that the officer in fact had a past shooting record.

The court was right in denying the application for a subpoena duces tecum. The point was discussed in detail in a similar New York case, where there was also an application for a subpoena duces tecum for the production of the personnel records of police officers. *People v. Coleman*, 75 Misc. 2d 1090, 349 N.Y.S. 2d 298 (1973). The court pointed out, with supporting citations, that such a subpoena may not be used for the purpose of discovery or to ascertain the existence of evidence. Rather, the purpose of the subpoena is to require the production of documents and other items that may assist in the development of testimony. As the court there said: "Where it is apparent that a party does not intend or cannot hope to offer testimony which refers to the items subpoenaed but merely seeks discovery and inspection, his application should be denied." We agree with that view.

Second, the prosecution's theory was that the burglary (of Kraftco hardware store) was committed by four persons, three of whom were inside the store and the fourth outside in a car as a lookout. The State's proof tended to show that the four men kept in touch with one another during the progress of the burglary, by means of a CB walkie-talkie inside the store and a CB radio in the car somewhere in the neighborhood. Over the appellant's objection a police officer was permitted to testify that he had been in the immediate vicinity of the burglary, that he had listened to his police car radio to the burglars' conversation, and that they had made certain statements which he quoted and

which indicated that the appellant was one of the men inside the store.

The appellant argues that the officer's narration of the burglars' purported conversation was inadmissible hearsay, because he could not identify the voices of any of the speakers. It is settled, however, that the authentication of a speaker's voice may be shown by circumstantial evidence, such as the situation in which a communication received by telephone "reveals that the speaker had knowledge of facts that only X would be likely to know." McCormick on Evidence, §226 (1972). The Uniform Rules of Evidence give several similar examples of the circumstantial identification of voices. Ark. Stat. Ann. §28-1001, Rule 901 (b) (6) (Supp. 1977).

Here there was an abundance of circumstantial evidence to support the trial judge's decision to admit the testimony about the burglars' conversation. Several police units cooperated in following the course of the burglary as it occurred, although they evidently did not know exactly where it was taking place. The appellant had been seen shortly before the burglary, leaving a residence in a particular car in company with three or four other men. That car was followed by a police unit to a point within a few blocks from Kraftco. There the police temporarily lost contact with it, and all the occupants except the driver left the vehicle. The car had a CB radio. After the burglary the car was again spotted by the police. A high-speed chase

followed, the result of which is not shown by the evidence.

The appellant, according to the State's theory, did not leave the scene of the burglary in the car identified by the police. Instead, he and another man drove away in a Kraftco truck filled with stolen merchandise. It was their intention, according to the monitored conversation, to meet the other two "at the spot." That plan was evidently thwarted by the officers' pursuit of the other car. After a few hours the appellant and his companion went back to the residence where the appellant had first been observed, parked the Kraftco truck nearby, and walked up to the residence. There the waiting police officers confronted them. When the two suspects tried to flee, the appellant was shot twice and fell to the ground. The key to the Kraftco truch was found underneath him. A CB walkie-talkie was found in the yard nearby. The radio was set on Channel 12, which was the channel used by the suspected burglars in their conversation. We need not narrate the State's proof in greater detail to show that the trial judge was fully warranted in finding from the circumstances that the monitored conversations were sufficiently authenticated to be admissible. Needless to say, their ultimate weight was a matter to be determined by the jury.

We have considered the appellant's third contention for reversal, but do not find it of sufficient merit to warrant discussion.

Affirmed.

EXHIBIT 2

IN THE PULASKI CIRCUIT COURT,

STATE OF ARKANSAS.....Plaintiff

VS. NO. CR 76-1549

CHARLES BRUCE NABORS.....Defendant

JUDGMENT

This day comes the State of Arkansas by Lloyd Haynes, Deputy Prosecuting Attorney, and comes the defendant in proper person and by his Attorney Russell Reinmiller, and the defendant having been called to the bar of the Court and entered his plea of not guilty thereto, parties announce ready for trial, thereupon come twelve (12) qualified electors of Pulaski County, Arkansas, viz: Asa Morgan, Janice Norwood, Jack Veatch, Robert Johnson, Rosetta Homan, Catherine Nicholson, Mark Morgan, Martin Hamilton, Michael Schafer, William Maquire, Hubert Gordon, Valerie Venters, who are empaneled and sworn as a trial Jury in this case, and after hearing the testimony of the witnesses, the instructions of the Court and the argument of Counsel, the Jury doth retire to consider arriving at a verdict and after due deliberation thereon, doth return into open Court with the following verdicts: "We, the Jury, find the defendant guilty of Theft of Property as charged in the Information and fix his punishment at a sentence of

Seventeen (17) Months in the State Penitentiary. Foreman." Whereupon the Court doth discharge the Jury from this case, and the Court doth ask the defendant if there is any legal reason why Judgment should not be entered at this time, and the defendant replying in the negative, the Court doth this day sentence and commit the defendant to Seventeen (17) Months in the State Penitentiary, and Cost. Defendant must serve 1/3 of sentence before being eligible for parole.

Defendant is advised of his right to appeal to the Arkansas Supreme Court, and further that he has thirty (30) days in which to file a Notice of Appeal.

/s/ Richard B. Adkisson
CIRCUIT JUDGE

July 1, 1977
DATE

EXHIBIT 3

in the Supreme Court of Arkansas

CHARLES BRUCE NABORS..... APPELLANTS

V.

STATE OF ARKANSAS..... RESPONDENT

ORDER

On this 12th day of June, 1978 the petiton for a re-hearing is denied.

EXHIBIT 4

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

VS. CASE NOS. CR-76-1549
and CR-76-1563

CHARLES BRUCE NABORS DEFENDANTS
MARK NABORS

MOTION SEEKING ISSUANCE OF SUBPOENA DUCES TECUM

Comes now defendants Charles Bruce Nabors and Mark Nabors by and through their counsel Russell Reinmiller and for their Motion, presented to the Court in chambers prior to the impaneling of the jury, state as follows:

1. Defendants move that the court command the appearance of Inspector T. B. Anderson of the Little Rock Police Department and Acting Chief of Police Williams Gibson of the Little Rock Police

Department in this court at the trial of the defendants on June 13, 1977. Inspector Anderson is to be required to bring with him all records of complaints maintained in his office concerning the service record of Little Rock Detective Keith Rounsavall. Acting Chief of Police Williams Gibson is to be required to produce at trial all files containing all records of shooting incidents in which Detective Keith Rounsavall has been involved as a Little Rock detective. Acting Chief of Police Williams Gibson is also to be commanded to produce at trial the record of any Little Rock Police Department I & A investigation of the incident in which Charles Bruce Nabors was shot by Detective Keith Rounsavall on July 14, 1976.

2. Defendants have reason to believe that the aforementioned record will be of significant value to them at their trial on June 13, 1977, in this court to attack the credibility of Detective Rounsavall who the State of Arkansas will use as a major prosecuting witness.

CHARLES BRUCE NABORS and
MARK NABORS, DEFENDANTS

By /s/ Russell Reinmiller
RUSSELL REINMILLER
Attorney for Defendants
2900 Percy Machin Drive
North Little Rock, AR 72114

EXHIBIT 5

IN THE PULASKI CIRCUIT COURT,
FOURTH DIVISION
JUNE 9, 1977

STATE OF ARKANSAS

VS CR76-1549, CR76-1563

CHARLES BRUCE NABORS

This day comes the State of Arkansas by Lloyd Haynes, Deputy Prosecuting Attorney, and comes the defendant in proper person and by his Attorney, Russell Reinmiller, and a Motion for Subpoena Duces Tecum is hereby denied.

EXHIBIT 6

PETITIONER'S BRIEF TO
SUPREME COURT OF ARKANSAS
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POINTS TO BE RELIED UPON

I.

THE FAILURE OF THE TRIAL COURT TO GRANT DEFENDANT'S MOTION FOR A SUBPOENA DUCES TECUM SEEKING THE PERSONNEL RECORDS OF OFFICER ROUNSAVALL WAS AN ABUSE OF DISCRETION BY THE COURT, VIOLATIVE OF THE FOURTEENTH AMENDMENT AND ALSO THE CONFRONTATION AND COMPULSORY WITNESS CLAUSE OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

II.

THE COURT ERRED IN ADMITTING HEARSAY TESTIMONY AS TO A CITIZENS BAND RADIO TRANSMISSION OVERHEARD BY THE POLICE OFFICERS.

III.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JOINDER OF OFFENSES.